APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SUBMITTED SEPTEMBER 10, 2001 AND FILED NOVEMBER 2, 2001

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; and Elaine Tschee Reid,

Appellees/Cross-Appellants,

v.

Charles G. Lamb, In His Official Capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In His Official Capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In Her Official Capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell, In Their Official Capacity as Members of the Missouri Ethics Commission; and Jeremiah W. (Jay) Nixon, In His Official Capacity as Missouri Attorney General,

Appellants/Cross-Appellees.

Appendix A

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: September 10, 2001

Filed: November 2, 2001

Before BOWMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a suit to enjoin the enforcement of Mo. Rev. Stat. § 130.032.4 and § 130.032.7, which limit the amount of cash and in-kind contributions that political parties may make to a candidate for public office, and provide penalties for violating the limitations that those statutes set. The plaintiffs (a political party, candidate committees, and candidates for public office) asserted that these statutes violated their rights of free speech under the First Amendment. When the district court refused to grant the plaintiffs relief, we reversed and remanded with instructions to the district court to enter an injunction. *See Missouri Republican Party v. Lamb*, 227 F.3d 1070 (8th Cir. 2000), *cert. granted and opinion vacated sub nom. Nixon v. Missouri Republican Party*, 121 S. Ct. 2584 (2001) (mem.). The state of Missouri then sought a writ of certiorari from the United States Supreme Court; the Supreme Court granted the writ, vacated our judgment, and directed us to reconsider the case in light of *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351 (2001) *(Colorado II)*. *See Nixon*, 121 S. Ct. at 2584. Upon further consideration, we affirm the judgment of the district court.

Appendix A

I.

In *Colorado II*, the Court held that political parties' first amendment claims are entitled to no higher level of scrutiny than claims advanced by individuals or Political Action Committees, and that a state may constitutionally limit the amount of money that a party spends in coordination with its own candidate. 121 S. Ct. at 2366. In upholding the limitations on party contributions found in 2 U.S.C.A. § 441 a(d)(3), the Supreme Court held that there was sufficient evidence in the record before it to support a legislative judgment that unregulated party contributions served to circumvent the contribution limits imposed on individuals set out in 2 U.S.C. § 441 a(a). "What a realist would expect to occur has occurred," the Court said. "Donors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 2367. The Court observed that candidates raise money for parties with the understanding that the candidates will receive party support in proportion to the amount that they raise and that candidates use the promise of future party support as an inducement when soliciting money. *Id.* at 2367-68. The Court further held that 2 U.S.C. § 441a(a)(8), which provides that contributions that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to the candidate, was not so effective a means of preventing circumvention that the First Amendment prevented resort to other means of prevention. The Court believed that holding otherwise would ignore "the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id.* at 2370. "The earmarking provision," the Court concluded, "would reach only the most clumsy attempts to pass contributions through to candidates," and thus further regulation was constitutionally justifiable. *Id.*

This aspect of the Supreme Court's ruling in *Colorado II* effectively undermines our previous conclusion that Missouri's limitations on parties' contributions to its candidates were unnecessary and thus unconstitutional because Missouri already had a law in place that prohibited earmarking agreements. *See Lamb*, 227 F.3d at 1073. The Missouri Republican Party argues vigorously, however, that there is no evidence in the present record that parties' contributions are in fact being used to circumvent Missouri's limitations on contributions by individuals, and that the state has therefore failed to carry its burden to justify the relevant regulation. We believe, however, that it is not necessary for the state to show that circumvention is actually occurring in Missouri, for the factual record developed in *Colorado II* suffices to justify Missouri's conclusion that means other than its earmarking prohibition are necessary to prevent circumvention.

In a closely analogous situation, the Court ruled that "[t]he First Amendment does not require [a legislative body], before enacting ... an ordinance, to conduct new studies or produce evidence independent of that already generated by other [legislative bodies], so long as whatever evidence the [legislative body] relies upon is reasonably believed to be relevant to the problem that the [legislative body] addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). While the state of Missouri of course did not rely on the evidence produced in *Colorado II* to justify its statute, it makes little constitutional sense to invalidate the statute when it would have been perfectly constitutional if it could have been shown that the Missouri legislature (in some collective sense?) had passed the statute with the proper frame of mind. In other words, we think that a statute is constitutional if

there is objective evidence of facts sufficient to render that statute valid, even if those facts were not operating subjectively in the minds of the legislators to motivate them when they enacted that statute. Any other rule would prove unworkable because, among other things, the minds of legislators are largely unknowable, individual legislators have various motives for voting the same way on the same bill, and legislative history is nonexistent in many states.

In short, we think that the holding in *Colorado II* establishes as a matter of law the constitutionality of the Missouri statutes relevant here. We note, too, that the evidence that the Court relied on in *Colorado II* to uphold the federal statute was not in existence when FECA was passed: That evidence was produced by the Federal Election Commission and was based on its experience under FECA. This serves to bolster our confidence in the view already expressed that no predicate record-making by the state of Missouri is necessary before the validity of its statute can be established.

Nor can we say that the limits that Missouri has set on political contributions by parties, though they are much lower than those upheld in *Colorado II*, are so low that they violate the First Amendment. The Supreme Court, in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000), quite emphatically held that the relevant question in the context is whether contribution limits are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Nothing in this record would indicate to us that these circumstances obtain in the state of Missouri at the present time.

We close our consideration of this aspect of the case with the observation that the Missouri Republican Party, in common with other political parties in Missouri, continue to have substantial avenues for expressing their support of their candidates and for maintaining a political and ideological solidarity with them. As the Court observed in *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam), "[a] limitation on the amount of money a person may give to a candidate . . . does not in any way infringe the contributor's freedom to discuss candidates and issues." The mode of discussion that the party chooses, moreover, may include advertising campaigns designated to promote issues and candidates, so long as those campaigns are not coordinated with those candidates. "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees," *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.), and it is therefore not subject to limitation. The Missouri Republican Party may "spend money in support of a candidate without legal limit so long as it spends independently." *Colorado II*, 121 S. Ct. at 2366.

II.

The Missouri Republican Party asserts that a remand is necessary because the district court did not address its claim that its due process rights were violated when the Missouri Election Commission (MEC) misled the Party into believing that there were no enforceable limits on party contributions. The Party asserts that the MEC told it that its contribution limits were ten times the limits on individual contributions,

and, the Party claims, this statement led the Party to believe that there were no limits on its contributions because at the time that the MEC made the statement the limits on individual contributions had been enjoined. That, the argument runs, the MEC was saying that there were no limits on Party contributions because 10 times infinity is infinity.

It is true, as the Party says, that the district court did not address this claim, but we think that that was for a good reason: The Party never made this claim below. Its claim, instead, was that the MEC violated due process when it calculated the limits on parties' contributions by multiplying the limits on individuals by ten because, in *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998), we had enjoined the enforcement of the statutes that set the limit on individuals. We see no merit in this argument. We had not enjoined the enforcement of Mo. Rev. Stat. § 130.032.4, the statute at issue here, and that statute set limits on parties at a figure that was numerically ten times that of the limits on individuals. The fact that we had declared these latter limits unconstitutional had no bearing on the efficacy of the limits on parties and no effect on the MEC's right and duty to enforce those limits. In other words, the MEC, pursuant to one statute, set numbers that were ten times the numbers that appeared in another statute; the fact that the enforcement of the latter statute had been enjoined as unconstitutional cannot furnish the basis for a constitutional claim, even if the limit chosen was not in conformity with state law.

The Party argues, finally, that the district court erred in not addressing its contention that the spending limits were being enforced against it in a discriminatory fashion: The

Party maintains that the MEC has ignored violations of contribution limits by the Missouri Democratic Party and seven of that party's candidates. But the Party never advanced this contention, either as a claim or as a defense, in the court below. The court was therefore not obligated to deal with it. We express no view on the ultimate merits of any action that the Party might bring in the future for discrimination against them in the enforcement of the relevant statutes.

III.

For the reasons indicated, the judgment of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's decision today, with its application of *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S.Ct. 2351 (2001) *(Colorado II)*, and with its opinion except for the last sentence of Part II. But in my view the court does not go quite far enough. Two aspects of the court's decision demonstrate a hesitation to give effect to Missouri's constitutionally valid campaign finance statutes that I think is no longer appropriate.

The court should vacate today its injunctive order of July 31, 2000, preventing Missouri from enforcing Mo. Rev. Stat. §§ 130.032.4 and 130.032.7 (2000), its statutes regulating party contributions to candidates in state elections. The State has requested that our injunctive order be vacated

now. Yet the court today allows the order to remain in force despite the destruction of its legal underpinning.[1]

Our July 31 order, issued over my dissent, was a one-sentence, summary grant of injunction barring enforcement of the party contribution limits pending this appeal. This order made no effort to comply with the standards required by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987), and applied in our decision in *Shrink Missouri Government PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998), and numerous other cases, for determining when an injunction pending appeal may issue.

The Supreme Court's *Colorado II* decision and its order of June 29, 2001 (which vacated our judgment and opinion of September 11, 2000, instructing the district court to enter a permanent injunctive order), returned the case to us for reconsideration. *Colorado II* drastically altered the legal landscape that confronted the court when the original injunction pending appeal was issued. The court today issues an opinion that decides the merits of the case *against* the Missouri Republican Party. The injunction should therefore be dissolved. The burden should be on the Party to demonstrate, *inter alia*, a likelihood of success on the merits (the "most important" factor in deciding whether an injunction should issue, *Adams*, 151 F.3d at 764), should it seek to continue the injunction.

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1. This may in some sense be a technical matter. Lifting our injunction would not have effect until a mandate issues to the district court below. But doing so would signal more strongly than our present opinion does that there is nothing before us to suggest that Missouri's party contribution limits are other than fully enforceable.

Finally, the last sentence in Part II of the court's opinion first speculates on what action may be taken in the future in this litigation, and then disclaims any decision on it. This is dictum, and I do not join in it.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SUBMITTED AUGUST 9, 2000 AND FILED SEPTEMBER 11, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; and Elaine Tschee Reid,

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Charles G. Lamb, In His Official Capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In His Official Capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In Her Official Capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell, In Their Official Capacity as Members of the Missouri Ethics Commission; and Jeremiah W. (Jay) Nixon, In His Official Capacity as Missouri Attorney General,

Appellants/Cross-Appellees.

Appendix B

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: August 9, 2000

Filed: September 11, 2000

Before BOWMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is a suit to enjoin the enforcement of Mo. Rev. Stat. § 130.032.4 and § 130.032.7, which limit the amount of cash and in-kind contributions that political parties may give to a candidate for public office, and provide penalties for violating the limitations that the statutes set. The plaintiffs (a political party, candidate committees, and candidates for public office) asserted that the statutes at issue violated their rights of free speech under the first amendment. The district court refused to issue an injunction and this appeal ensued. We reverse and remand with directions to the district court to enter an injunction that is not inconsistent with this opinion.

I.

The complaint in this case set out a series of cash contributions that the Missouri Republican Party made to the other plaintiffs in this case, described the actions that the defendants (the members of the Missouri Ethics Commission and the Missouri attorney general) intended to take against the plaintiffs because the contributions exceeded those that

Missouri law allows, and asked for an injunction against the enforcement of the statutes under which the defendants intended to proceed.

The plaintiffs argued to the district court that the monetary expenditures at issue here were not really contributions, as that term is regularly used in cases of this kind, but rather were coordinated expenditures made in conjunction and cooperation with the candidates and their committees. The district court rejected that construction of the facts, and held that there was no genuine factual dispute about the nature of the monetary expenditures involved, because the candidates retained control over how the money was to be spent. We agree with the district court.

We recognize that there will be cases in which the line between a contribution and a coordinated expenditure will be hard to draw, and we concede that that line may frequently be particularly difficult to discern when the case involves money that passes from a party to one of its candidates. That is partly because, for reasons that will presently appear, we believe that it is often difficult to distinguish a party from its candidates at all. But here, as the district court noted, the candidates admitted that, although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit. It is this freedom on the part of the candidates that provides them with the kind of independence that requires us to characterize the money that passed to them as contributions as a matter of law.

This characterization, as the parties recognize, is important to the case because, although the Supreme Court

has not decided the precise issue before us, it has decided that contributions by individuals are subject to limitation, despite the first amendment interests at stake, *see Buckley v. Valeo*, 424 U.S. 1, 20-23 (1976) *(per curiam)*, while independent expenditures by political parties are not, *see Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 608 (1996). Although these cases do not directly rule this one, since it falls somewhere between them, we nevertheless think that they provide guidance on the proper resolution of the questions raised. We believe that the recent case of *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), however, on which the defendants heavily rely, is of limited value in this respect, because, as we explain later, the fact that one of the plaintiffs in this case is a political party serves to distinguish it from *Shrink Missouri Government PAC* in a crucial way.

II.

The most important case for present purposes is *Buckley*, 424 U.S. at 20-21, which held that a limitation on individuals' contributions to candidates for public office was constitutional because such a limitation imposed "only a marginal restriction upon the contributor's ability to engage in free communication." That was because, as the Supreme Court saw it, a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," *id.* at 21. A limitation on contributions, the Court therefore concluded, "involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution," *id.*

We think that these considerations simply do not carry the same force when the contributor is a political party. The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

We are not suggesting that there is always an exact one-to-one correspondence between candidates and their parties. Candidates and parties have their observable differences, and there is truth in the old adage that a platform is something to stand on, not to run on: Candidates are not mere agents or mouthpieces. But parties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard-bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Because of their unity of purpose, and the virtual identity of parties and their candidates, it is not easy to say, in the words of *Buckley*, 424 U.S. at 21, that a political party's contribution "does not communicate the underlying basis for the support." To the contrary, a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly

be called a "contribution" in the same sense that the individual contributions at stake in *Buckley* were. Nor is a party's contribution to its candidate, again in the words of *Buckley, id.*, merely a "symbolic expression" of support; it is more like a substantive political statement than others' contributions are. As we see it, all of this indicates that the first amendment rights at stake here are different from, and weightier than, those that were involved in *Buckley*. *Cf. Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1227-28 (10th Cir. 2000).

III.

The nature and character of political parties are relevant to another important aspect of our consideration of this case, namely, the kind of reason that the government must advance in order to justify an intrusion on first amendment rights. In *Shrink Missouri Government PAC*, 120 S. Ct. at 905-06, the Supreme Court held that preventing the corruption of candidates served as a sufficiently compelling reason to limit the size of contributions from individuals and political action committees. But, as Mr. Justice Thomas has observed, it is not easy to see how a party could "corrupt" one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles. *See Colorado Republican Federal Campaign Committee*, 518 U.S. at 646 (opinion of Thomas, J.). As we see it, the threat that a political party will corrupt a candidate is not a very realistic one.

The defendants suggest alternatively that preventing the circumvention of the limits on individual contributions can

serve to justify regulating the size of party contributions. *See Buckley*, 424 U.S. at 38; *see also id.* at 35-36. *Buckley*, however, upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate. *See id.* at 38. But here the challenged restriction is on the party's giving, and the defendants seek to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving. This scheme burdens the free speech rights of political parties in order to control the activities of someone else. This is something quite different from what *Buckley* approved.

Besides, the defendants admitted in their brief in this case that it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum. Such a contribution, the defendants say, would be treated under Missouri law as a contribution by the individual, not the party. The defendants therefore already have a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit. *Cf.* 2 U.S.C. § 441a(a)(8). Limitations on party spending might have an indirect attenuating effect on secret "earmarking" agreements between individuals and political parties because such agreements may be hard to detect and police directly, but we think that that is too frail a rationale to justify burdening the substantial free speech rights of political parties that we have identified as being in jeopardy in this case. *Cf. Colorado Republican Federal Campaign Committee*, 213 F.3d at 1231-32.

Appendix B

The Supreme Court recently observed that, in deciding cases of this kind, it is important to keep in mind that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," *Shrink Missouri Government PAC*, 120 S. Ct. at 906. In this case, the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented. Since, for the reasons indicated, we think that the justifications advanced for the statutory limitations relevant here are, in the context, novel and not particularly plausible, we hold that the challenged Missouri limitations on cash contributions are unconstitutional.

IV.

The district court refused to allow the plaintiffs to file an amended complaint because it believed that the proposed amendment raised issues with respect to in-kind contributions that the original complaint did not raise. It is true that the amended complaint adverted to the likelihood that most, if not all, in-kind contributions would actually be coordinated expenditures rather than contributions in the purest sense; and it is also true, as the district court noted, that the original complaint emphasized the impending enforcement efforts by the defendants with respect only to cash contributions. But the original complaint did challenge Missouri's statutory limits on in-kind contributions from parties, and the summary judgment materials contained evidence relating to those kinds of contributions. We therefore think that the case papers fairly

raise the matter of in-kind contributions. Given our view of the case, namely, that the limitations on cash contributions are unconstitutional on their face, and given the fact that the defendants have advanced no basis on which, for constitutional purposes, the two kinds of contributions can be distinguished in the present factual context, we hold that Missouri's limits on in-kind contributions also offend the first amendment.

V.

We therefore reverse the judgment of the district court and remand the case for the entry of an injunction that is not inconsistent with this opinion.

JOHN R. GIBSON, Circuit Judge, concurring and dissenting.

I concur in the court's opinion to the extent that it holds that the payments by the party to the candidates were contributions and not expenditures. The candidates' freedom to spend the money as they saw fit requires that the money passed to them be characterized as contributions as a matter of law.

I agree that the Supreme Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), provide guidance. I differ, however, with the court's conclusion that political party contributions are distinguishable from the situation presented in *Buckley* and with the court's assertion that the recent decision in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), is of limited value here.

Appendix B

Buckley developed the groundwork for analyzing the constitutionality of campaign finance laws, distinguishing between contributions and expenditures and concluding that contribution limits impose less severe restrictions on First Amendment rights than expenditure limits. *See* 424 U.S. at 19-23. In *Shrink Missouri*, the Court recognized this distinction in upholding Missouri's limits on contributions made by any person. *See* 120 S. Ct. at 903-04. Significantly, five justices joined Justice Souter's opinion for the Court. True, *Shrink Missouri* does not speak directly to issues involving political party contributions. It does, however, demonstrate the continuing vitality of *Buckley*, and it sets out the standard we must apply here.

The court today asserts that, because of the special nature of political parties, limits on their contributions are more burdensome than limits on contributions by individuals. The court supports its determination that the First Amendment rights of political parties "are different from, and weightier than, those that were involved in *Buckley*" with the novel conclusion that political parties and their candidates share a "virtual identity." While the court asserts that parties and candidates have "observable differences" and that there is not always an exact correspondence between them, it goes on to describe the party/candidate relationship in a variety of ways: a party and its candidate are "virtually indistinguishable from each other" and are "virtual alter egos" whose "identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities." The court tergiversates as it reaches for a description of this relationship. Upon this shifting foundation, the court constructs its entire opinion.

Appendix B

There is no apparent consensus on the Supreme Court about the relationship between political parties and candidates. The *Colorado Republican* plurality (Justices Breyer, O'Connor, and Souter) rejected the argument that "a party and its candidate are identical, i.e., the party, in a sense, 'is' its candidates," pointing out that Congress treats parties and candidates differently by regulating contributions from one to the other. 518 U.S. at 622-23. Concurring and dissenting, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, observed that there is "a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity," along with "a practical identity of interests" between the two during an election. *Id.* at 630. Justice Thomas, also concurring and dissenting and also joined by Chief Justice Rehnquist and Justice Scalia, argued that a political party could not corrupt its candidate because the party's "very aim . . . is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes ." *Id.* at 646. Justice Stevens, joined by Justice Ginsburg, stated in dissent:

> A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party — or the persons who control the party — will abuse the influence it has over the candidate by virtue of its power to spend.

Id. at 648. The various expressions articulated by the court today come closest to Justice Kennedy's observations, but his conclusion that a party and its candidates engage in

joint activity and share interests falls short of the court's conclusion that they are virtually identical, virtual alter egos, or in some way merged.

Regardless of the nature of the relationship, party contributions to candidates can be regulated. Although *Buckley* upheld limits on contributions by individuals and political committees, not political parties, its analysis was framed in a way that leads to the conclusion that it applies to all contributions, no matter what their source. *Buckley* addressed the constitutionality of various restrictions on political contributions and expenditures contained in the Federal Election Campaign Act, an "intricate statutory scheme adopted by Congress . . . that appl[ies] broadly to all phases of and *all participants* in the election process." 424 U.S. at 12-13 (emphasis added). The Court discussed contribution and expenditure limits in a section of its opinion entitled "General Principles," *id.* at 14, preceding any discussion of the specific provisions at issue in the case. This placement indicates that the Court intended to set forth universally applicable precepts. Also telling is the fact that the Court discussed expenditure limits on political parties immediately before contrasting expenditure limits with contribution limits:

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except

> candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.
>
> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

Id. at 19-21 (footnotes omitted). The order of the Court's argument suggests that its discussion of contribution limits is fully applicable to limits on political parties.

Colorado Republican provides further support for the conclusion that *Buckley*'s analysis applies here. The plurality held that the First Amendment prohibited applying the Federal Election Campaign Act's limit on political party expenditures to "an expenditure that the political party has made independently, without coordination with any candidate." *Colorado Republican*, 518 U.S. at 608. The opinion stressed the constitutional difference between contributions and

expenditures that originated in *Buckley*. *See id.* at 614-15. The plurality's emphasis on the "constitutionally significant fact" that the party acted independently, *id.* at 617, demonstrates an assumption that limits on coordinated expenditures by political parties, which are treated as contributions under the Act, would be more likely to withstand constitutional scrutiny. *Cf. California Democratic Party v. Jones*, 120 S. Ct. 2402, 2415 (2000) (Kennedy, J., concurring) (five members of the Supreme Court "subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.").

It is thus evident that the constitutional distinction between contributions and expenditures applies to political party money. The free speech rights of parties are not greater than the free speech rights of individuals and political committees. Speech, after all, is speech, whether expressed by one or by a group formed to convey a common viewpoint. Limits on party contributions are subject to the same level of scrutiny as limits on individual and political committee contributions.

The contribution limits at issue should be upheld if they are closely drawn to meet a sufficiently important interest. *See Shrink Mo.*, 120 S. Ct. at 904. The court relies on what it perceives to be the lack of a sufficiently important interest to hold that the limits are unconstitutional. The court doubts that a political party can corrupt its own candidate, but Missouri does not justify its limits on that ground. Instead,

it explains that the limits deter evasion of individual contribution limits.[1]

A plurality of the Supreme Court upheld limits on contributions to multicandidate political committees because the limits furthered the interest of preventing actual or apparent corruption by limiting "circumvention of the very limitations on contributions that this Court upheld in *Buckley.*" *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 197-98 (1981). Writing separately, Justice Blackmun also concluded "that contributions to multicandidate political committees may be limited . . . as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley.*" *Id.* at 203. *See also Buckley*, 424 U.S. at 38 (upholding a $25,000 overall limit on total contributions made by an individual because it acted to prevent evasion of the $1000 limit on contributions to a particular candidate that the Court held constitutional).

Missouri's justification for the party contribution limits is neither novel nor implausible: in both *Buckley* and *California Medical*, the Supreme Court accepted preventing evasion of a constitutional limit as a sufficiently important governmental interest. The court's insistence on evidence to

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1. Missouri also briefly argues that the party limits address the public's perception of corruption that occurs when large contributions are made to political parties, political parties make large contributions to candidates, and the candidates' decisions mirror the large contributors' positions. This is a variation on the evasion argument. That is, an appearance of corruption may arise if individuals can evade contribution limits by using a political party as a conduit.

support this justification runs counter to these decisions and to the *Shrink Missouri* decision, which held that Missouri's individual limits are justified by its important interest in preventing corruption and the appearance of corruption. *See* 120 S. Ct. at 905-08. If there is sufficient evidence to support individual contribution limits enacted to prevent corruption or the appearance of corruption, it logically follows that there is sufficient evidence to support a contribution limit enacted to prevent evasion of the individual limits.

The court relies on its conclusion that political parties have different and more important free speech rights than individuals to discount Missouri's interest in deterring evasion of its individual contribution limits. Because contributions made by a political party are no different than contributions made by individuals or other groups, this reliance is unfounded.

The remaining issue is whether the limits are closely drawn to meet the government's interest. Under *Shrink Missouri*, a contribution limit will stand unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909. There is no evidence in the record to support a conclusion that Missouri's limits on political party contributions have created such "a system of suppressed political advocacy." *Id.* Because Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not violate the First Amendment.

I would affirm the district court's judgment.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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2. The court holds that the limits on in-kind contributions offend the First Amendment, an issue not passed upon by the district court. Under my analysis, the in-kind limits are constitutionally valid.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC DATED JANUARY 4, 2002

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, etc., et al.,

Appellees/Cross-Appellants,

vs.

Charles G. Lamb, etc., et al.,

Appellants/Cross-Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian and Judge William Jay Riley would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

January 4, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D — MISSOURI ETHICS COMMISSION, ADJUSTED POLITICAL PARTY COMMITTEE CONTRIBUTION LIMITS (JAN. 24, 2002)

The contribution limits established by Section 130.032 of the Missouri Revised Statutes increase on January 1 of each even numbered year. At its conference call meeting on January 24, 2002, the Missouri Ethics Commission approved staffs calculation of the inflation adjustments established for political party committee contribution limits.

Monetary contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one general election or opposed primary election shall not exceed the following:

1. To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor of [sic] attorney general, $11,675.00;

2. To elect an individual to the office of state senator, $5,850.00;

3. To elect an individual to the office of state representative, $2,925.00;

4. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under 100,000, $3,000.00;

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5. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least 100,000 but less than 250,000, $5,750.00;

6. To elect an individual to any other office, including a judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least 250,000 $11,750.00.

The amount of contributions which may be made by or accepted from a political party committee in a primary election to elect any candidate who is unopposed in that primary is 50% of the amount stated above for the office in question.

http://www.moethics.state.mo.us/MEC/AdjustedContributionJan2002.htm#Party.